No. 92-985

In the Supreme Court of the United States

OCTOBER TERM, 1992

MICHAEL R. GOLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's expenditure of $120,000 to produce and broadcast a political commercial in cooperation with one of three candidates for the United States Senate, in an effort to influence the race between the two other candidates, violated the Federal Election Campaign Act of 1971, which prohibits individuals from contributing more than $1,000 to a candidate and his political committees.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 959 F.2d 1449.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1992. The petition for rehearing was denied on October 27, 1992 (Pet. App. 17a-20a). The petition for a writ of certiorari was filed on December 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, peti-

tioner was convicted of making illegal contributions to a political campaign, in violation of provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. 441a(a)(1)(A) and 437g(d). He was sentenced to three months' imprisonment, to be followed by three years' probation, including 1,000 hours of community service. See Gov't C.A. Br. 5. The court of appeals affirmed. Pet. App. 1a-16a.

1. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, prohibits financial contributions "to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000." 2 U.S.C. 441a(a)(1)(A). For purposes of that provision, "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). The FECA does not place limits, however, on an "independent expenditure," which is defined as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

2. The evidence at trial showed that in 1986, Democrat Alan Cranston, Republican Ed Zschau, and American Independent Party candidate Ed Vallen campaigned for election to the United States Senate.

According to the polls, the contest between Cranston and Zschau was close. Petitioner favored Cranston because Cranston advocated a foreign policy supporting Israel. To assist Cranston's reelection effort, petitioner decided to air a television commercial that would support Vallen and would divert Republican votes from Zschau. Petitioner admitted that either he or Colleen Morrow, whom he had hired to help with the anti-Zschau effort, conceived the idea of a television commercial featuring Vallen praising Cranston and criticizing Zschau. Pet. App. 2a.

Petitioner used Los Angeles media consultant Mike Barnes to contact Vallen and produce the commercial. Petitioner wrote the script for the commercial, but he concealed his identity from Vallen, because he believed Vallen would reject money from a pro-Israel source. The commercial opened with a camera shot of Vallen stating, "I'm Ed Vallen. I want to be your United States Senator. You know the slanderous attacks that Ed Zschau has made against me. Mr. Zschau lacks integrity." Gov't C.A. Br. 14 n.17. Vallen then claimed to be "the only true conservative" in the race and stated that only he and Senator Cranston had any "integrity." *Ibid.* Petitioner financed the commercial by sending Barnes $120,000 in cashier's checks payable to Greenstripe Media, the company Barnes had retained to coordinate broadcasts of the commercial. Pet. App. 2a-3a.[1]

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[1] When Vallen first reviewed the script, he balked at reading the portion that praised Cranston as having "integrity." Barnes then called Morrow, who said that petitioner would have to approve any changes in the script. Barnes contacted petitioner by telephone and petitioner stated

Federal election regulations require that televised political commercials contain a "tag line" at the conclusion identifying the source of payment. See 11 C.F.R. 110.11(a)(1)(iii); Pet. App. 3a. Petitioner's commercial did not identify petitioner as the funding source. The tag line instead read "Paid for by the Committee to Elect Ed Vallen to the U.S. Senate." Pet. App. 3a. Petitioner claimed that he did not see the tag line until the commercial first appeared on the air, but he did not do anything to withdraw the commercial once he saw it. Additionally, petitioner collected checks from (and then gave cash reimbursements to) ostensible contributors, creating the appearance that Vallen's political committee paid for the commercial through proper contributions. Petitioner admitted that he participated in that effort to keep the commercial on the air. *Ibid.*; Gov't C.A. Br. 14.

3. Petitioner made three principal arguments on appeal. First, petitioner contended that he did not violate the FECA, because he gave the money to Greenstripe Media and not to Vallen himself. The court of appeals rejected that argument, concluding that the FECA bars not only direct contributions to a candidate, but also contributions made indirectly through an intermediary. Pet. App. 4a-5a. Next, petitioner argued that his financing of the commercial amounted to an "independent expenditure[]" on

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that, except for a few changes, the script must be read as written. Vallen agreed to read the commercial, deciding that the television exposure that he would receive would be valuable, even if he did not entirely agree with the commercial's content. See Gov't C.A. Br. 14.

behalf of Cranston's reelection. *Id.* at 5a-6a. The court held that the "independent expenditures" exception did not apply, noting that petitioner's and Vallen's agents were acting in concert and that Vallen cooperated with petitioner by accepting the money and performing in the commercial. *Id.* at 6a. Finally, petitioner argued that he could not have made an unlawful contribution to Vallen's political committee because the "Committee to Elect Ed Vallen to the U.S. Senate" did not exist when the commercial was made. The court of appeals ruled, however, that "[n]othing on the face of section 441a(a)(1)(A) requires the existence of an authorized political committee to sustain a valid prosecution; an excessive contribution to a candidate suffices." *Id.* at 7a. "The government presented sufficient evidence for the jury to conclude that [petitioner] made such a contribution to Vallen." *Ibid.*[2]

ARGUMENT

1. Petitioner contends (Pet. 6-11) that his expenditure of $120,000 to produce and air the political commercial supporting Ed Vallen's candidacy did not violate the FECA, because the commercial was

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[2] Judge Pregerson dissented. Reasoning that "the commercial was a medium for [petitioner's] political speech and was in no way intended to support Vallen," Judge Pregerson concluded that "[t]he commercial should be considered an independent expenditure protected by the First Amendment." Pet. App. 14a. In the alternative, Judge Pregerson would have invoked the rule of lenity, *id.* at 13a-14a, concluding that "[t]he law is not clear whether the statute encompasses tactics of using one candidate to further the election of another candidate," *id.* at 12a.

intended to facilitate Senator Cranston's reelection and therefore qualified as an "independent expenditure" on behalf of Cranston. The court of appeals correctly rejected that argument. As petitioner concedes (Pet. 6), he spent $120,000 to prepare a television commercial that encouraged viewers to vote for Ed Vallen. The expenditure, which funded a commercial featuring Vallen himself promoting his candidacy, was clearly a contribution to Vallen within the meaning of the FECA.[3]

Petitioner argues that his expenditure should not be subject to the FECA's limitations, because he actually supported Senator Cranston and he contributed to Vallen's campaign only to assist Cranston's reelection. That argument is without merit. The FECA prohibits contributions to candidates in excess of $1,000 without regard to the contributor's motive in making the contribution. 2 U.S.C. 441a(a)(1)(A). It is immaterial that petitioner promoted Vallen's campaign with the ultimate goal of diminishing support for Cranston's principal opponent. The important point is that petitioner made a financial contribution, in excess of prescribed limits, to Vallen's election bid.[4]

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[3] See 2 U.S.C. 441a(a)(7)(B)(i) ("expenditures made by any person in cooperation, consultation, or concert, with * * * a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate").

[4] Petitioner is incorrect in stating that he "had no intention whatsoever of contributing to or benefiting the Vallen campaign." Pet. 8. Although petitioner conceived his expenditure as a means of supporting Cranston, he sought to achieve that ultimate end by promoting Vallen at Zschau's expense. As this Court recognized in *Buckley* v. *Valeo*, 424 U.S. 1 (1976),

Contrary to petitioner's suggestion, his financing of a television commercial featuring Vallen does not qualify as an "independent expenditure" within the meaning of the FECA. An "independent expenditure" must be made "without cooperation or consultation with *any* candidate, or *any* authorized committee or agent of such candidate." 2 U.S.C. 431(17) (emphasis added). Thus, it does not matter that the contributor secretly opposes the candidate who receives the contribution. If there is cooperation or consultation with "any" candidate or candidate's committee, the contribution does not qualify as an "independent expenditure." As the court of appeals correctly recognized, "Vallen cooperated with [petitioner] by accepting the money and performing the commercial." Pet. App. 6a.[5]

Moreover, the testimony at trial reveals that petitioner himself did not regard his contribution as qualifying as an "independent expenditure." The evidence showed that petitioner's agents, Morrow and Barnes, told him that because the commercial would feature Vallen it could be conducted only as an official campaign expenditure of Vallen's political committee, Gov't C.A. Br. 13-14; that petitioner never mentioned

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such tactics are not unusual. "Even when a minor-party candidate has little or no chance of winning, he may be encouraged by major-party interests in order to divert votes from other major-party contenders." *Id.* at 70.

[5] Petitioner makes much of the claim that "[n]either Vallen nor anyone acting on his behalf had any role whatever in the creation, writing, or filming of the commercial." Pet. 8. Nevertheless, Vallen indisputably appeared in the commerical and thereby directly cooperated in its production.

to Morrow doing the commercial as an "independent expenditure," *id.* at 13; and that he never filed a report of an "independent expenditure" with the Federal Election Commission, as required by law. See 11 C.F.R. 109.2.[6]

2. Petitioner also contends (Pet. 11-14) that he cannot be convicted of violating the FECA, because the alleged recipient of the contribution—the Committee to Elect Ed Vallen to the U.S. Senate—did not exist on October 27, 1986, the date the contribution was made. Petitioner is mistaken as to both the facts and the law. The evidence at trial showed that Vallen's political committee did exist at the time of petitioner's contribution. Moreover, as the court of appeals explained, petitioner's contribution was illegal regardless of the status of Vallen's political committee.

The FECA defines the term "candidate" as "an individual who seeks nomination for election, or election, to Federal office." 2 U.S.C. 431(2). It further provides that a person becomes a candidate for purposes of the Act if he has received contributions in excess of $5,000 or has made expenditures in excess of $5,000. 2 U.S.C. 431(2)(A). The FECA directs that the

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[6] Petitioner incorrectly states that the government conceded during oral argument in the court of appeals that the commercial was an "independent expenditure" on behalf of Senator Cranston. Pet. 9. The government simply stated, in response to a question from the bench, that petitioner expended funds independently of Cranston in the sense that Cranston had no involvement in producing the commercial. The government did not concede that the commercial qualified as an "independent expenditure" within the meaning of Section 431(17). See Gov't C.A. Response to Pet. for Reh'g 17.

candidate must designate his principal political committee—which is defined as a "political committee designated and authorized by a candidate," 2 U.S.C. 431(5)—"no later than 15 days" after he becomes a candidate. 2 U.S.C. 432(e)(1).

In this case, the evidence showed that, on August 15, 1986, Vallen filed a Statement of Candidacy, which was received by the Federal Election Commission on August 26, 1986. Vallen's statement designated as his principal political committee the "Committee to Elect Ed Vallen for U.S. Senate." Gov't C.A. Br. 24 & n.24; C.A. Excerpts of Rec. 148 (DX 501F). In a filing dated October 18, 1986, Vallen reported that "[o]n or about the 10th of August we took in the $5,000 to qualify for the U.S. Senate from . . . the State of California." Gov't C.A. Br. 24. In its Statement of Organization, dated October 20, 1986, but not received by the Commission until November 4, 1986, the Vallen campaign treasurer reported total contributions of $5,640.26. *Ibid.* Thus, the evidence established that by October 27, 1986, the date of petitioner's contribution, Vallen had officially become a candidate and had in place a political committee.

Petitioner's contention that Vallen did not have a principal political committee on October 27, 1986, rests on an additional Statement of Candidacy that the Commission received from Vallen on October 27, 1986, which contained in the space reserved for the name of Vallen's political committee, "N/A at this time." C.A. Excerpts of Rec. 151 (DX 501G). The document petitioner cites, however, was originally dated and filed on May 13, 1986, before Vallen had designated a principal political committee. See *ibid.*;

Gov't C.A. Br. 24 n.24. Petitioner overlooks the designation of a principal political committee contained in Vallen's August 15, 1986, filing. Moreover, the October 27, 1986, filing that petitioner cites includes a declaration stating that "[t]he name of our committee is Committee to Elect Ed Vallen to the U.S. Senate." See Gov't C.A. Br. 24 n.24; C.A. Excerpts of Rec. 154.[7]

In any event, petitioner's argument would fail even if Vallen's campaign committee had not been officially designated by October 27, 1986. By its plain terms, the FECA bars contributions in excess of $1,000 to "any *candidate* and his authorized political committees." 2 U.S.C. 441a(a)(1)(A) (emphasis added). As the court of appeals correctly recognized, if petitioner's payment did not qualify as an excessive contribution to Vallen's political committee, it clearly qualified as one to the candidate himself. Pet. App. 7a. After all, the purpose of a political committee is to accept funds for the candidate's campaign, and any contribution to the committee is a contribution to the candidate. Congress included the "political committees" language only to make clear that contributions to political committees count toward the $1,000 limit for

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[7] Petitioner also argues (Pet. 14 n. 6) that he could not have entertained the requisite specific intent to violate the statute because he did not know that Vallen had designated an authorized political committee. The documents on file with the Federal Election Commission, however, provided public notice of the existence of Vallen's political committee at the time petitioner made his contribution. Significantly, even after the commercial was broadcast under the "Committee to Elect Ed Vallen to the U.S. Senate" tag line, petitioner did not attempt to withdraw the commercial. Pet. App. 3a.

each candidate. See H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 53 (1976) ("contributions made to a candidate's authorized political committees, are considered to be contributions to that candidate rather than contributions to that committee").[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] As the court of appeals explained, the fact that the indictment charged petitioner with making excessive contributions to Vallen's committee rather than to Vallen directly would not result in a material variance, because the candidate and his committee are "a single unit" for the purpose of accepting contributions. Pet. App. 7a-8a.